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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

SAN DIEGO BIKE & KAYAK TOURS, INC., a California Corporation, Plaintiff, vs. LA JOLLA KAYAK & COMPANY, LLC, a limited liability company; LA JOLLA KAYAK, LLC, a California corporation; MICHAEL LUSCOMB, an individual; SHARON LUSCOMB, an individual, Defendants.	Case No.: '07 CV 2173 L (CAB) **COUNTER-CLAIM FOR:** **(1) FEDERAL TRADEMARK INFRINGEMENT;** **(2) VIOLATION OF UNREGISTERED TRADEMARK (TRADE DRESS) UNDER SECTION 43(a) OF THE LANHAM ACT;** **(3) FALSE DESIGNATION OF ORIGIN;** **(4) TRADE NAME INFRINGEMENT;** **(5) INFRINGEMENT OF UNREGISTERED TRADEMARK UNDER CALIFORNIA TRADEMARK LAW;** **(6) COMMON LAW TRADEMARK INFRINGEMENT AND UNFAIR COMPETITION;** **(7) VIOLATION OF CALIFORNIA STATUTORY UNFAIR COMPETITION LAW (Bus. & Prof. Code § 17200, Et. Seq.);** **(8) BREACH OF ORAL CONTRACT;** **(9) BREACH OF PARTNERSHIP AGREEMENT;** **(10) BREACH OF FIDUCIARY DUTY;** **(11) BREACH OF THE COVENANT OF GOOD FAITH AND FAIR DEALING;** **(12) PROMISSORY ESTOPPEL;** **(13) DECLARATORY RELIEF;** **(14) AND INJUNCTIVE RELIEF.** **JURY TRIAL DEMANDED**
LA JOLLA KAYAK & COMPANY, LLC, a limited liability company; LA JOLLA KAYAK, LLC, a California corporation, Defendants and Counter-Claimants, vs. SAN DIEGO BIKE & KAYAK TOURS, INC., a California corporation; MARCELLA DI MICHIELI, an individual, and as dba SAN DIEGO BIKE & KAYAK TOURS; NICHOLAS BAUMAN, an individual, AND ROES 1-99; Inclusive, Counter-Defendants.	

Defendants and Counter-Claimants LA JOLLA KAYAK & COMPANY, LLC, LA JOLLA KAYAK, LLC, MICHAEL LUSCOMB, AND SHARON LUSCOMB (hereinafter collectively refer to as "Counter-Claimants") allege as follows:

THE PARTIES

1. Counter-Claimant LA JOLLA KAYAK & COMPANY, LLC., is, and at all times relevant was, a California limited liability company with its principal place of business at 2199 Avenida de la Playa, La Jolla, California 92037.

2. Counter-Claimant LA JOLLA KAYAK, LLC, is, and at all times relevant was, a California corporation with its principal place of business at 2199 Avenida de la Playa, La Jolla, California 92037. SHARON LUSCOMB owns and operates Counter-Claimants LA JOLLA KAYAK & COMPANY, LLC and LA JOLLA KAYAK, LLC, and is an individual residing in the county of San Diego, State of California. MICHAEL LUSCOMB is an authorized agent of Counter-Claimants La Jolla Kayak & Company, LLC and La Jolla Kayak LLC. Counter-Claimants La Jolla Kayak & Company, LLC and La Jolla Kayak LLC are hereinafter referred to collectively as "La Jolla Kayak & Co., LLC."

3. Counter-Claimants are informed and believe, and therefore allege that Plaintiff and Counter-Defendant SAN DIEGO BIKE & KAYAK TOURS, INC., is, and at all times relevant was, a California corporation with its principal place of business at 2222 Avenida de la Playa, La Jolla California, 92037.

4. Counter-Claimants are informed and believe, and therefore allege, that Counter-Defendant Marcella Di Michieli, is, and at all times relevant was, an individual residing in the county of San Diego, State of California and doing business as Counter-Defendant San Diego Bike & Kayak Tours, an unknown business entity.

5. Counter-Claimants are informed and believe, and therefore allege that Counter-Defendant NICHOLAS BAUMAN (hereinafter refer to as "BAUMAN") is, and at all times relevant was, an individual residing in the county of San Diego, State of California, and a shareholder of Counter-Defendant San Diego Bike & Kayak Tours, Inc.

6. The true names and capacities of Counter-Defendants sued herein as Roes 1-99 are currently unknown to Counter-Claimants, and are therefore sued by such fictitious names. Counter-Claimants will seek leave to amend these counter-claims to allege their true names and capacities when they have been ascertained. Counter-Claimants were informed and believe that each of the fictitiously named Counter-Claimants are responsible in some manner for occurrences herein alleged, and that Counter-Claimants' damages were proximately caused by their conduct.

JURISDICTION AND VENUE

7. This action arises in part under 15 USC §1051 – 1127 (hereinafter the "Lanham Act") and the common law of unfair competition, as more fully set forth below.

8. This Court has Jurisdiction of this action under 28 USC §§1331, 1338(a) and (b), and under the Lanham Act. This Court also has supplemental jurisdiction under 28 U.S.C. §1367 for the state law claims.

9. The Court has personal jurisdiction over Counter-Defendants because Counter-Defendants each reside in the state of California. Furthermore, Counter-Defendants have purposely availed themselves of the privileges of conducting activities in California, the claim arises out of Counter-Defendants' forum related activities, and the exercise of jurisdiction is reasonable.

10. Venue is proper in this judicial district pursuant to 28 U.S.C. 1391(b) because Counter-Defendants reside in this judicial district and the events giving rise to this Counter-Claim occurred in this judicial district.

FACTUAL BACKGROUND

11. La Jolla Kayak & Co., LLC is a small local business located in La Jolla, California, that provides kayak, snorkeling tours and rentals primarily in and around La Jolla, including kayak tours in the coastal areas from La Jolla Shores to La Jolla Cove, including the La Jolla caves. La Jolla Kayak & Co., LLC has provided kayak tours in La Jolla since January 1, 1995. Continuously since its inception, Counter-Claimants have used the trade name "LA JOLLA KAYAK" to identify their business and to distinguish it from the business of others, by, among other things, prominently displaying the trade name "LA JOLLA KAYAK" and their later adoption

of the service mark in Registration No. 3,297,782, in the sale and advertising of services, and on displays associated therewith. In addition, Counter-Claimants have prominently displayed said trade name on store fronts, letterheads, bills, direct mail advertising, and telephone directory advertising throughout California.

12. La Jolla Kayak & Co. LLC's trade name and service mark have become, through widespread and favorable industry acceptance and recognition, an asset of substantial value as a symbol of quality services and good will. In fact, in or around 2003, Counter-Claimant La Jolla Kayak, LLC received an award for its "Rack Card," bearing the service mark. On September 25, 2007, the United States Patent and Trademark Office issued Registration Certificate No. 3297782 to Counter-Claimants confirming registration of "LA JOLLA KAYAK" and a picture of La Jolla Cave with a silhouette of a man in the entrance of the cave and the words "LA JOLLA KAYAK" written at the top of the picture in a particular style, as a service mark upon the Principal Register for the United States. (A true and correct copy of the registration is attached hereto as **Exhibit 1**). Said registration is in full force and effect.

13. Counter-Claimants have devoted substantial time, effort and resources to the development and promotion throughout San Diego County and other parts of California of the trade name "LA JOLLA KAYAK," and service mark and services sold under said trade name and mark. As a result of these promotional efforts, the purchasing public has come to know, rely upon, and recognize the business and services of Counter-Claimants by such name and mark. By virtue of Counter-Claimants' marketing efforts and expenditures, and as a result of the quality of their services, Counter-Claimants' trade name and service mark have achieved a valuable reputation and a high degree of goodwill.

14. Counter-Claimants have learned that Counter-Defendants have used and are using a confusingly similar mark of the La Jolla cave as the one in Registration No. 3297782 for their service mark, and selling, offering for sale, and advertising their services under variations of the trade name "LA JOLLA KAYAK." Said use of said trade names and service mark by Counter-Defendants is without permission or authority of Counter-Claimants and said use by Counter-

Defendants is likely to cause confusion, to cause mistake, and to deceive. Counter-Claimants are informed and believe, and upon that basis allege, that Counter-Defendants are direct competitors of Counter-Claimants in this respect. That the respective products and services are directly competitive is evinced by a page from Counter-Defendants own website (a printout is attached hereto as **Exhibit 2.**)

15. Counter-Defendants have adopted and used the service mark in Registration No. 3297782 and the trade name “LA JOLLA KAYAK”, and such variations thereof including: “La Jolla Kayaks”, “La Jolla Kayak Rentals”, “La Jolla Kayaking”, “Kayaking in La Jolla” “Kayak in La Jolla” “La Jolla Kayak Tours”, in commerce for kayak tours and rentals, despite Counter-Claimants’ established common law rights in, and imminent registration for, its service mark and trade name. Counter-Defendants’ willful acts are evinced in the following examples: Counter-Defendants listed their business phone in information services, Verizon, Cingular, and SBC, under the name “La Jolla Kayaking,” which provides their business phone number and location first in the listing. Moreover, Counter-Defendants have used “Adwords” that Counter-Defendant Bauman had created and used in La Jolla Kayak & Co., LLC’s internet advertising, which he supervised when he was employed as a general manager at La Jolla Kayak & Co., LLC. Further, Counter-Defendants have hosted the domain name “LAJOLLAKAYAKS.com” on their website, which is extremely misleading and confusing to a customer that thinks he or she is reaching La Jolla Kayak & Co., LLC. Even more notably, Counter-Defendants have utilized La Jolla Kayak & Co., LLC’s pictures on their website and even pictures of Michael Luscomb kayaking on their snorkeling page.

16. Counter-Claimants are informed and believe, and on that basis allege, that Counter-Defendants adopted their “trade name(s)” and “service marks” with full knowledge of Counter-Claimants’ services and service mark and with the intention that consumers would be confused into believing that Counter-Defendants’ services were sponsored, associated or affiliated in some way with Counter-Claimants’ and its services and products. That customers have been confused is evinced by the following example – Counter-Defendants created a “Rack Card” bearing similar mark to that in Registration No. 3297782, and paid to include it into the same advertising vendor

program that Counter-Claimant La Jolla Kayak, LLC has used for the past 5 years. (A sample of Counter-Claimants' "Rack-Card" and Counter-Defendants' "Rack-Card" is attached hereto as **Exhibits 3 & 4**, respectively, and are incorporated by this reference as though fully stated herein.) Counter-Defendant San Diego Bike & Kayak Tours, Inc.'s "Rack-Card" is virtually identical to Counter-Claimant La Jolla Kayak, LLC's. Counter-Defendants' "Rack-Card" is so confusingly similar to Counter-Claimant La Jolla Kayak, LLC's that Counter-Claimants have had customers and concierges inquire about the "new rack card" thinking it was Counter-Claimant La Jolla Kayak, LLC's. Counter-Claimant La Jolla Kayak, LLC won an award in 2003 for its rack card which is distributed in the majority of hotels in San Diego and Orange Counties, and has not changed the format of its "Rack-Card" since winning the award.

17. Counter-Claimants have no control over the nature and quality of Counter-Defendants' services. Any failure, neglect or default by Counter-Defendants in providing such services will reflect adversely on Counter-Claimants as the believed source of origin thereof, hampering efforts by Counter-Claimants to continue to protect their reputation for high quality services. This will cause Counter-Claimants to lose sales and the benefit of their considerable expenditures to promote their products under their service mark, all to Counter-Claimants' detriment.

18. Because Counter-Claimants' and Counter-Defendants' services are directly competitive, it is natural for consumers to assume that said services and their sources are associated or affiliated. Such a result significantly undermines Counter-Claimants' substantial efforts to establish their identity in the kayak tours' and rental business. Counter-Claimants have requested that Counter-Defendants cease and desist from infringing Counter-Claimants' trademark. But Counter-Defendants have refused to comply with said requests. Despite Counter-Claimants' requests, Counter-Defendants, with actual notice of the infringement, willfully and blatantly continue to advertise and market their services under Counter-Claimants' trade names and service mark. Said acts of infringement will cause further irreparable injury to Counter-Claimants if Counter-Defendants are not restrained by this Court from further violation of Counter-Claimants rights, and Counter-Claimants have no adequate remedy at law.

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FIRST CAUSE OF ACTION
(Federal Trademark Infringement Under "Lanham Act")

19. Counter-Claimants reallege and reincorporate by reference each and every allegation contained in Paragraphs 1 through 18 of this Complaint, as though fully set forth herein.

20. Counter-Defendants actions described above and specifically, without limitation, Counter-Defendants' use of their "Rack-Card," containing the service mark in Registration No. 3,297,782 to promote their services to the same audience as that for Counter-Claimants' services constitutes trademark infringement in violation of section 32 of the Lanham Act, 15 U.S.C. §1114.

21. Counter- Defendants' adoption and use of a mark so similar to Counter-Claimants' registered service mark has caused and continues to cause irreparable injury to Counter-Claimants' name and mark, as well as to Counter-Claimants' business, goodwill and reputation. Counter-Defendants' actions, if not enjoined, will continue, including the sale of services through the same channels of trade used by Counter-Claimants and to the same customers targeted by Counter-Claimants. Counter-Claimants have no adequate remedy at law in that the amount of damages is difficult to ascertain with certainty.

22. As a result of Counter-Defendants' infringement of the service mark, Counter-Claimants have incurred damages in an amount to be proven at trial consisting of, among other things, diminution in the value of, and goodwill associated with, their mark.

23. Counter-Defendants' actions as described above are deliberate, willful, fraudulent and without any extenuating circumstances, and constitute a knowing violation of Counter-Claimants' rights. Counter-Claimants are therefore entitled to recover three times the amount of their actual damages, attorneys' fees and costs incurred in this action, as this is an "exceptional" case under Section 35 of the Lanham Act, 15 USC § 1117.

SECOND CAUSE OF ACTION
(Infringement of Unregistered Trademark Under Section 43(a) of the Lanham Act)
(Trade Dress)

24. Counter-Claimants reallege and reincorporate by reference each and every allegation

contained in paragraphs 1 through 23 as though fully set forth herein.

25. Counter-Claimants have adopted an inherently distinctive trade dress for the presentation and sale of its kayak and tour services. This trade dress consisted of, among other things, a careful selection of the right cave in La Jolla, the placement and position of the person in a kayak at the entrance of the cave, all created and display the essence of services offered by Counter-Claimants. Counter-Claimants have spent a substantial amount of money developing and enhancing their service mark, which distinctiveness won an award in 2003. The unique combination of the above elements has resulted in a distinctive, non-functional trade dress that consumers identify with Counter-Claimants.

26. Counter-Defendants' infringement and unfair competition as described above has caused substantial customer confusion. Counter-Defendants have been using the confusingly similar mark of Counter-Claimants service mark in Registration No. 3,297,782 on their brochures and other forms of advertising. As stated above, Counter-Defendants' "Rack Card" is virtually identical to that of Counter-Claimants' which resulted in concierges and customers inquiring about the "new rack card" thinking it was Counter-Claimants'. Counter-Defendants' use of said service mark is without permission or authority of Counter-Claimants and said use by Counter-Defendants is likely to cause confusion, to cause mistake, and to deceive.

27. Counter-Claimants have requested Counter-Defendants cease and desist from their act of trademark infringement, but Counter-Defendants have refused to cease such acts.

28. Said acts of Counter-Defendants constitute trademark infringement of Counter-Claimants' rights in said service mark.

29. By reason of Counter-Defendants' acts alleged herein, Counter-Claimants have and will suffer damage to their business, reputation and good will and the loss of sales and profits Counter-Claimants would have made but for Counter-Defendants' acts.

30. Counter-Defendants threaten to continue to do the acts complained of herein, and unless restrained and enjoined, will continue to do so, all to Counter-Claimants' irreparable damage. It would be difficult to ascertain the amount of compensation which could afford Counter-Claimants adequate relief for such continuing acts, and a multiplicity of judicial proceedings would be required. Counter-

Claimants' remedy at law is not adequate to compensate them for injuries threatened by Counter-Defendants' conduct.

THIRD CAUSE OF ACTION
(False Designation of Origin)

31. Counter-Claimants reallege and reincorporate by reference each and every allegation contained in paragraphs 1 through 30 as though fully set forth herein.

32. Counter-Claimants' trade name "LA JOLLA KAYAK" and service mark in Registration No. 3,297,782 have become uniquely associated with, and hence identify, La Jolla Kayak & Co., LLC. Counter-Defendants' use of the designation "LA JOLLA KAYAK" and the service mark in Registration No. 3,297,782 is a false designation of origin, or a false representation, that wrongfully and falsely designates Counter-Defendants' services as originating from, or being connected with said Counter-Claimants, and constitutes the use of false descriptions or representations in commerce. Counter-Defendants' use is likely to deceive consumers into believing that Counter-Defendants' services are those of or associated with Counter-Claimants, and as a consequence, Counter-Defendants' use is likely to divert, and has diverted, consumers away from Counter-Claimants' services.

33. Counter-Defendants' actions described above and specifically, without limitation, Counter-Defendants' use of the trade name "LA JOLLA KAYAK," and variations thereof such as: "LA JOLLA KAYAK RENTALS," "LA JOLLA KAYAKS," "KAYAK IN LA JOLLA," "LA JOLLA KAYAKING," "KAYAKING IN LA JOLLA," "LA JOLLA KAYAK TOURS," and the service mark in Registration No. 3,297,782 to promote their services to the same audience as that for Counter-Claimants' services constitutes a false designation of origin and unfair competition in violation of the Lanham Act.

34. Counter-Defendants' adoption and use of a mark so similar to Counter-Claimants' mark has caused, and continues to cause, irreparable injury to the value and goodwill of Counter-Claimants' mark, as well as to Counter-Claimants' business, goodwill and reputation. Counter-Defendants' actions, if not enjoined, will continue, including the sale of their services through the same channels of trade

used by Counter-Claimants and to the same customers targeted by Counter-Claimants. Counter-Claimants have no adequate remedy at law in that the amount of their damages is difficult to ascertain with certainty.

35. As a result of Counter-Defendants' false designation of origin and unfair competition, Counter-Claimants have incurred and will continue to incur damages in an amount to be proven at trial consisting of, among other things, actual diversion of trade and diminution in the value of the goodwill associated with their service mark.

36. Counter-Defendants' actions as described above are deliberate, willful, fraudulent and without any extenuating circumstances, and constitute a knowing violation of Counter-Claimants' rights. Upon registration of their mark, Counter-Claimants are entitled to recover three times the amount of their actual damages and attorneys' fees and costs incurred in this action, as this is an "exceptional" case under Section 35 of the Lanham Act, 15 U.S.C. §1117.

FOURTH CAUSE OF ACTION
(Trade Name Infringement)

37. Counter-Claimants reallege and reincorporate by reference each and every allegation contained in paragraphs 1 through 36 as though fully set forth herein.

38. Counter-Claimants adopted the trade name "LA JOLLA KAYAK," and have used it continuously in commerce since January 1, 1995.

39. Continuously since on or about January 1, 1995, Counter-Claimants have used the trade name "LA JOLLA KAYAK" to identify their business and to distinguish it from the business of others.

40. Counter-Claimants' trade name have acquired a secondary meaning because it has been used exclusively to identify Counter-Claimants' business so as to indicate Counter-Claimants' services and theirs alone.

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41. Counter-Defendants have infringed Counter-Claimants' trade name by using it after Counter-Claimants, and after Counter-Claimants' trade name had acquired a secondary meaning. Counter-Defendants' use of said trade name is without permission or authority of Counter-Claimants and said use by Counter-Defendants is likely to cause confusion, to cause mistake, and to deceive.

42. Counter-Claimants have given notice that they are the trade name owners. Counter-Claimants have requested Counter-Defendants cease and desist from their act of trademark infringement and have given Counter-Defendants actual notice of Counter-Claimants' trade name, and rights in same, but Counter-Defendants have refused to cease such acts.

43. Said acts of Counter-Defendants constitute trade name infringement of Counter-Claimants' rights in said trade name "LA JOLLA KAYAK".

44. By reason of Counter-Defendants' acts alleged herein, Counter-Claimants have and will suffer damage to their business, reputation and good will and the loss of sales and profits Counter-Claimants would have made but for Counter-Defendants' acts.

45. Counter-Defendants threaten to continue to do the acts complained of herein, and unless restrained and enjoined, will continue to do so, all to Counter-Claimants' irreparable damage. It would be difficult to ascertain the amount of compensation which could afford Counter-Claimants' adequate relief for such continuing acts, and a multiplicity of judicial proceedings would be required. Counter-Claimants' remedy at law is not adequate to compensate them for injuries threatened by Counter-Defendants' conduct.

FIFTH CAUSE OF ACTION
(Infringement Of Unregistered Trademark Under California Trademark Law)

46. Counter-Claimants reallege and reincorporate by reference each and every allegation contained in Paragraphs 1 through 45 of this Complaint, as though fully set forth herein.

47. Counter-Claimants adopted the trade name "LA JOLLA KAYAK" and service mark in Federal Registration No. 3,297,782, and used them continuously in commerce for their services. Counter-Claimants have not yet filed an application for registration of said mark in the State of

California covering the use of said mark for services. However, continuously since on or about January 1, 1995, Counter-Claimants have used the trade name "LA JOLLA KAYAK," and adopted service mark in Registration No. 3,297,782 prior to Counter-Defendant San Diego Bike and Kayak Tours' use thereof, to identify Counter-Claimants' services and to distinguish them from those made and sold by others, by, among, other things, prominently displaying said trade name and mark on their brochures, and displays associated therewith. In addition, Counter-Claimants have prominently displayed said trade name and mark on store fronts, letterheads, bills, direct mail advertising, and telephone directory advertising throughout California.

48. Counter-Defendants have infringed Counter-Claimants' trade name and mark by various acts, including selling, offering for sale, and advertising their services under the names "LA JOLLA KAYAK," "LA JOLLA KAYAKING," "LA JOLLA KAYAKS," LA JOLLA KAYAK RENTALS," "KAYAKING LA JOLLA," "LA JOLLA KAYAK TOURS," "KAYAK IN LA JOLLA," "KAYAKING IN LA JOLLA," and using the service mark in Registration No. 3,297,782 on their "Rack-Card" and other forms of advertising. Said use of said names and mark by Counter-Defendants is without permission or authority of Counter-Claimants and said use by Counter-Defendants is likely to cause confusion, to cause mistake, and to deceive.

49. Counter-Claimants have given notice that it is the mark owner. Counter-Claimants have requested Counter-Defendants cease and desist from their act of trademark infringement, but Counter-Defendants have refused to cease such acts.

50. Said acts of Counter-Defendants constitute trademark infringement of Counter-Claimants' rights in the aforementioned trade names and service mark.

51. By reason of Counter-Defendants' acts alleged herein, Counter-Claimants have and will suffer damage to their business, reputation and good will and the loss of sales and profits Counter-Claimants would have made but for Counter-Defendants' acts.

52. Counter-Defendants threaten to continue to do the acts complained of herein, and unless restrained and enjoined, will continue to do so, all to Counter-Claimants' irreparable damage. It would be difficult to ascertain the amount of compensation which could afford Counter-Claimants adequate

relief for such continuing acts, and a multiplicity of judicial proceedings would be required. Counter-Claimants' remedy at law is not adequate to compensate them for injuries threatened.

SIXTH CAUSE OF ACTION

(Common Law Trademark Infringement and Unfair Competition)

53. Counter-Claimants reallege and reincorporate by reference each and every allegation contained in paragraphs 1 through 52 as though fully set forth herein.

54. By virtue of Counter-Defendants' acts as pleaded above, Counter-Defendants have engaged in acts of unfair competition with Counter-Claimants.

55. Counter-Defendants' acts of unfair competition have caused and continue to cause irreparable injury to the value and goodwill of Counter-Claimants' mark, as well as to Counter-Claimants' business, goodwill and reputation. Counter-Defendants' actions, if not enjoined, will continue through the same channels of trade used by Counter-Claimants and to the same customers targeted by Counter-Claimants. Counter-Claimants have no adequate remedy at law in that the amount of its damages is difficult to ascertain with certainty.

56. As a result of Counter-Defendants' acts of unfair competition, Counter-Claimants have incurred damages in an amount to be proven at trial consisting of, among other things, actual diversion of their trade and diminution in the value of goodwill associated with their trade name "LA JOLLA KAYAK" and the service mark in Registration No. 3,297,782.

SEVENTH CAUSE OF ACTION

(Violation of California Statutory Unfair Competition Law)

57. Counter-Claimants reallege and reincorporate by reference each and every allegation contained in paragraphs 1 through 56 as though fully set forth herein.

58. By virtue of Counter-Defendants' acts as pleaded above, Counter-Defendants have engaged in unfair competition in violation of California Business and Professions Code §§17200, *et seq.*

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59. Counter-Defendants' acts of unfair competition have caused and continue to cause irreparable injury to the value and goodwill of Counter-Claimants' mark, as well as to Counter-Claimants' business, goodwill and reputation. Counter-Defendants' actions, if not enjoined, will continue through the same channels of trade used by Counter-Claimants and to the same customers targeted by Counter-Claimants. Counter-Claimants have no adequate remedy at law in that the amount of its damages is difficult to ascertain with certainty.

60. As a result of Counter-Defendants' acts of unfair competition, Counter-Claimants have incurred damages in an amount to be proven at trial consisting of, among other things, actual diversion of its trade and diminution in the value of goodwill associated with their trade name "LA JOLLA KAYAK" and the service mark in Registration No.3,297,782.

EIGTH CAUSE OF ACTION
(Breach of Oral Contract)
(Against Counter-Defendants Marcella Di Michieli, and San Diego Bike and Kayak Tours, Only)

61. Counter-Claimants reallege and reincorporate by reference each and every allegation contained in paragraphs 1-60 as though fully set forth herein.

62. In or around 2004, Counter-Defendant Marcella Di Michieli, a former employee of Counter-Claimant La Jolla Kayak, entered into an oral agreement with Michael Luscomb, an authorized agent of La Jolla Kayak, to operate Counter-Defendant San Diego Bike and Kayak Tours out of Counter-Claimant La Jolla Kayak's store.

63. The terms of the oral agreement were that Counter-Defendant San Diego Bike and Kayak Tours would operate through La Jolla Kayak to implement bike tours to create a full-time business for Counter-Defendant Di Michieli, and also to increase business for Counter-Claimant La Jolla Kayak. Counter-Defendant San Diego Bike and Kayak Tours also agreed to pay approximately $5,000 of the rack card printing and distribution fee. Counter-Defendant San Diego Bike and Kayak Tours also agreed to pay Counter-Claimant La Jolla Kayak twenty (20) percent of revenue for the partnership according to certain monthly projections. For revenues beyond the monthly projections, Counter-Defendant San Diego Bike and Kayak Tours agreed to pay La Jolla Kayak 22.5%.

64. Counter-Claimant La Jolla Kayak agreed to allow Counter-Defendant San Diego Bike and Kayak Tours to advertise from its store by allowing Counter-Defendant San Diego Bike and Kayak Tours to place a sign in its store window on the “inquire within about bike tours” or “Bike Tours Available” signs. In addition, Counter-Claimant La Jolla Kayak agreed to allow Counter-Defendant San Diego Bike and Kayak Tours to advertise its name, phone number and other miscellaneous information on Counter-Claimant La Jolla Kayak’s vinyl sign. Counter-Claimant La Jolla Kayak also agreed to display information brochures for San Diego Bike and Kayak Tours on the counter top in its store. Counter-Claimant La Jolla Kayak also agreed to pay $2,000.00 of the rack card distribution and printing fee, and also that the rack card for Counter-Defendant San Diego Bike and Kayak Tours would feature a header/title that says “San Diego Bike & Kayak Tours, In Partnership with La Jolla Kayak.” La Jolla Kayak also agreed to display a key on the menu bar of the website labeled “Bike Tours” that would route customers to the website of Counter-Defendant San Diego Bike & Kayak Tours, and to setup a menu option on the phone system for bike tours, which recording would give Counter-Defendant San Diego Bike and Kayak Tours phone number for bike tour reservations.

65. Counter-Claimant La Jolla Kayak performed all conditions, covenants and promises required on their part to be performed in accordance with the terms and conditions of the agreement.

66. Counter-Defendants Di Michieli and San Diego Bike and Kayak Tours breached the agreement when Counter-Defendant Di Michieli moved San Diego Bike and Kayak Tours out of La Jolla Kayak’s store without prior notice to La Jolla Kayak, and established a competing business across the street from La Jolla Kayak, and entered into direct competition with La Jolla Kayak.

67. As a direct and proximate result of the breaches of the oral agreement, Counter-Claimant La Jolla Kayak suffered damage in an amount to be proved at trial.

NINTH CAUSE OF ACTION
(Breach of Partnership Agreement)
(Against Counter-Defendants Marcella Di Michieli, and San Diego Bike and Kayak Tours, Only)

68. Counter-Claimants reallege and reincorporate by reference each and every allegation contained in paragraphs 1-67 as though fully set forth herein.

69. In or around 2004, Counter-Defendant Marcella Di Michieli, a former employee of Counter-Claimant La Jolla Kayak, entered into an oral agreement with Michael Luscomb, an authorized agent of Counter-Claimant La Jolla Kayak, to operate her business, Counter-Defendant San Diego Bike and Kayak Tours, out of Counter-Claimant La Jolla Kayak's store.

70. The terms of the oral partnership agreement were that Counter-Defendant San Diego Bike and Kayak Tours would operate through Counter-Claimant La Jolla Kayak to implement bike tours to create a full-time business for Counter-Defendant Di Michieli, and also to increase business for Counter-Claimant La Jolla Kayak. Counter-Defendant San Diego Bike and Kayak Tours also agreed to contribute approximately $5,000 of the rack card printing and distribution fee. Further, as part of the terms of their agreement, Counter-Defendant San Diego Bike and Kayak Tours agreed to pay Counter-Claimant La Jolla Kayak twenty (20) percent of revenue for the partnership according to certain monthly projections. For revenues beyond the monthly projections, Counter-Defendant San Diego Bike and Kayak Tours would pay Counter-Claimant La Jolla Kayak 22.5%. Counter-Claimant La Jolla Kayak agreed to allow Counter-Defendant San Diego Bike and Kayak Tours to advertise from its store by allowing Counter-Defendant San Diego Bike and Kayak Tours to place a sign in its store window on the "inquire within about bike tours" or "Bike Tours Available" signs. In addition, Counter-Claimant La Jolla Kayak agreed to allow Counter-Defendant San Diego Bike and Kayak Tours to advertise its name, phone number and other miscellaneous information on La Jolla Kayak's vinyl sign. Counter-Claimant La Jolla Kayak also agreed to display information brochures for San Diego Bike and Kayak Tours on the counter top in its store. La Jolla Kayak also agreed to and contributed $2,000.00 of the rack card distribution and printing fee. The rack card for San Diego Bike and Kayak Tours featured a header/title that says "San Diego Bike & Kayak Tours, In Partnership with La Jolla Kayak." La Jolla Kayak also agreed to display a key on the menu bar of the website labeled "Bike Tours" that would route customers to the website of San Diego Bike & Kayak Tours, and to setup a menu option on the phone system for bike tours, which recording would give San Diego Bike and Kayak Tours phone number for bike tour reservations.

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71. Counter-Claimants performed all conditions, covenants and promises required on their part to be performed in accordance with the terms and conditions of the agreement.

72. In or around April 2006, Counter-Defendants Di Michieli and San Diego Bike and Kayak Tours breached the agreement when Counter-Defendant Di Michieli moved San Diego Bike and Kayak Tours out of Counter-Claimant La Jolla Kayak's store without prior notice to La Jolla Kayak, and established a competing business across the street from Counter-Claimant La Jolla Kayak, and entered into direct competition with Counter-Claimant La Jolla Kayak.

73. As a proximate result of Counter-Defendants' breach of the partnership contract, Counter-Claimants have suffered damage in an amount to be proven at trial, consisting of lost profits that would have been earned by the partnership but for Counter-Defendants' breach, in an amount to be proven at trial.

TENTH CAUSE OF ACTION
(Breach of Fiduciary Duty)
(Against Counter-Defendants Marcella Michieli and San Diego Bike and Kayak Tours, Only)

74. Counter-Claimants reallege and reincorporate by reference each and every allegation contained in paragraphs 1-73 as though fully set forth herein.

75. By intentionally repudiating the existence of the partnership, using information gained through the partnership to contact vendors and establish relationships required for Counter-Defendant San Diego Bike and Kayak Tours, Inc., Counter-Defendants Di Michieli and San Diego Bike and Kayak Tours have breached the duty of care imposed by Corporations Code Setion 16404(c) to the partnership and to Counter-Claimant La Jolla Kayak.

76. As a proximate result of Counter-Defendants Di Michieli and San Diego Bike and Kayak Tours' breach of their duty of care to the partnership and to Counter-Claimant La Jolla Kayak, La Jolla Kayak has suffered damage, consisting of lost profits that would have been earned by the partnership but for Counter-Defendants' Di Michieli and San Diego Bike and Kayak Tours' breach, in an amount to be proven at trial.

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77. On information and belief, Counter-Defendants Di Michieli and San Diego Bike and Kayak Tours' breaches of their fiduciary duties were willful, wanton, malicious and oppressive and were planned and done in deliberated disregard for Defendant and Counter-Claimant La Jolla Kayak's rights under their partnership agreement and with the intent and for the purpose of injuring Counter-Claimant La Jolla Kayak and to further their competing business. Therefore, pursuant to California Civil Code section 3294, Counter-Claimant La Jolla Kayak is entitled to punitive damages in a sum according to proof to punish and set an example of Counter-Defendants' Di Michieli and San Diego Bike and Kayak Tours for their wrongful conduct.

ELEVENTH CAUSE OF ACTION

(Breach of Covenant of Good Faith and Fair Dealing)

(Against Counter-Defendants San Diego Bike and Kayak Tours and Marcella Di Michieli)

78. Counter-Claimants reallege and reincorporate by reference each and every allegation contained in paragraphs 1-77 as though fully set forth herein.

79. The aforesaid oral contract contained an implied covenant of good faith and fair dealing by which Counter-Defendants Di Michieli and San Diego Bike and Kayak Tours promised to give full cooperation to Counter-Claimant La Jolla Kayak and their performance under the said contract and to refrain from doing any act which would prevent or impede Counter-Claimant La Jolla Kayak's enjoyment of the fruits of the said contract. Specifically, the said covenant of good faith and fair dealing required Counter-Defendants Di Michieli and San Diego Bike and Kayak Tours to fairly, honestly and reasonably perform the terms and conditions of the agreement.

80. Counter-Claimant La Jolla Kayak is informed and on that basis believes that Counter-Defendants Di Michieli and San Diego Bike and Kayak Tours breached the contract with Counter-Claimant La Jolla Kayak without conducting any reasonable investigation concerning their obligations under the said contract, without good or sufficient cause, for reasons extraneous to the contract, and for the purpose of frustrating La Jolla Kayak's enjoyment of the benefits of the contract. Accordingly,

Counter-Defendants Di Michieli and San Diego Bike and Kayak Tours breached their implied duty of good faith and fair dealing.

81. Further, Counter-Defendants Di Michieli and San Diego Bike and Kayak Tours breached this covenant with regard to Counter-Claimant La Jolla Kayak by Counter-Defendants Di Michieli and San Diego Bike and Kayak Tours moving San Diego Bike and Kayak Tours out of Counter-Claimant La Jolla Kayak's store without prior notice to La Jolla Kayak, and establishing a competing business across the street from La Jolla Kayak, and entering into direct competition with Counter-Claimant La Jolla Kayak.

82. As a result of Counter-Defendants Di Michieli and San Diego Bike and Kayak Tours' violation of said implied covenant of good faith and fair dealing and their reprehensible and willful conduct, Counter-Claimant La Jolla Kayak has suffered damages in an amount to be proven at trial.

TWELFTH CAUSE OF ACTION
(Promissory Estoppel)
(Against Counter-Defendants San Diego Bike and Kayak Tours and Marcella Di Michieli)

83. Counter-Claimants reallege and reincorporate by reference each and every allegation contained in paragraphs 1 through 82 as though fully set forth herein.

84. In or around 2004, Counter-Defendant Di Michieli, a former employee of Counter-Claimant La Jolla Kayak, orally promised and represented to Michael Luscomb, an authorized agent of Counter-Claimant La Jolla Kayak, her intent to carry on a partnership with La Jolla Kayak, in that she would operate her business (Counter-Defendant San Diego Bike and Kayak Tours) out of Counter-Claimant La Jolla Kayak's store for her benefit and also to increase business for Counter-Claimant La Jolla Kayak. Counter-Defendant Di Michieli, on behalf of San Diego Bike and Kayak Tours also represented that she would contribute approximately $5,000 of the rack card printing and distribution fee. Counter-Defendant Di Michieli further promised on behalf of Counter-Defendant San Diego Bike and Kayak Tours to pay La Jolla Kayak twenty (20) percent of revenue for the partnership according to certain monthly projections. For revenues beyond the monthly projections, Counter-Defendant San Diego Bike and Kayak Tours promised to pay La Jolla Kayak 22.5%.

85. In so doing, Counter-Defendants Di Michieli and San Diego Bike and Kayak Tours knew or should have known that Michael Luscomb, on behalf of Counter-Claimant La Jolla Kayak, would be reasonably induced to rely on Counter-Defendant Di Michieli's promise and representation by agreeing to advertise and advertised Counter-Defendant Di Michieli's business (Counter-Defendant San Diego Bike and Kayak and Tours) from La Jolla Kayak's store by allowing Counter-Defendant San Diego Bike and Kayak Tours to place a sign in its store window on the "inquire within about bike tours" or "Bike Tours Available" signs. In addition, Counter-Claimant La Jolla Kayak allowed Counter-Defendant San Diego Bike and Kayak Tours to advertise its name, phone number and other miscellaneous information on La Jolla Kayak's vinyl sign. Counter-Claimant La Jolla Kayak also displayed information brochures for San Diego Bike and Kayak Tours on the counter top in its store, and contributed $2,000.00 of the rack card distribution and printing fee.

86. Michael Luscomb on behalf of Counter-Claimant La Jolla Kayak reasonably relied on Counter-Defendant Di Michieli's promise and representations and was induced to advertise Counter-Defendant Di Michieli's business (Counter-Defendant San Diego Bike and Kayak and Tours) from La Jolla Kayak's store by allowing Counter-Defendant San Diego Bike and Kayak Tours to place a sign in its store window on the "inquire within about bike tours" or "Bike Tours Available" signs. In addition, Counter-Claimant La Jolla Kayak allowed Counter-Defendant San Diego Bike and Kayak Tours to advertise its name, phone number and other miscellaneous information on La Jolla Kayak's vinyl sign. Counter-Claimant La Jolla Kayak also displayed information brochures for Counter-Defendant San Diego Bike and Kayak Tours on the counter top in its store, and contributed approximately $2,000.00 of the rack card distribution and printing fee.

87. As of April 2006, without prior notice to Counter-Claimant La Jolla Kayak, Counter-Defendants Di Michieli and San Diego Bike and Kayak Tours established a competing business across the street from Counter-Claimant La Jolla Kayak and thereby failed to perform according to their representation.

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88. As a proximate result of Counter-Defendants Di Michieli and San Diego Bike and Kayak Tours' failure to perform according to their promise and representation made to Michael Luscomb on behalf of Counter-Claimant La Jolla Kayak, Counter-Claimant La Jolla Kayak has suffered damage in an amount to be proven at trial.

89. Counter-Claimant La Jolla Kayak have changed position relying on the oral agreement, and as such, injustice can be avoided only by enforcing Counter-Defendants Di Michieli and San Diego Bike and Kayak's promise and representation completely to avoid unconscionable injury.

THIRTEENTH CAUSE OF ACTION
(Declaratory Relief)

90. Counter-Claimants reallege and reincorporate by reference each and every allegation contained in paragraphs 1 through 89 as though fully set forth herein.

91. An actual controversy exists between Counter-Claimants and Counter-Defendants relating to the legal rights of the respective parties arising out of the Counter-Defendants' use of the trade name "LA JOLLA KAYAK," and such variations thereof as "LA JOLLA KAYAKS," "LA JOLLA KAYAK RENTAL," LA JOLLA KAYAKING," LA JOLLA KAYAK TOURS," "KAYAKING LA JOLLA," and service mark in Registration No. 3,297,782.

92. Counter-Claimants contend that:

a. Counter-Defendants does not have any right to use any of the above-mentioned trade names and service mark in Registration No. 3,297,782 in selling, offering for sale, and advertising of their services;

b. Counter-Defendants' use of said service mark and/or a confusingly similar mark on its "Rack-Card" and other forms of advertising misleads and confuses the public.

c. The aforementioned acts of Counter-Defendants were performed in direct contravention of and with utter disregard for Counter-Claimants' prior use of the trade name and service mark;

d. That Counter-Claimants have the exclusive right to use the service mark in Registration No. 3,297,782.

93. Counter-Defendants contend that:

a. Their use of the above-mentioned trade names does not infringe on any of Counter-Claimants federal and state trademark rights.

b. Counter-Defendants also contend that their use of service mark in Registration No. 3,297,782, or a similar mark in the sale and advertising of their services does not infringe the Counter-Claimants' service mark in Registration No. 3,297,782, and does not violate any rights of Counter-Claimants under federal and state trademark law, including but not limited to the Lanham Act, California Business & Professions Code §§17200, et. seq., and/or California Business & Professions Code §§17500, et. seq.

94. Counter-Claimants seek a judicial declaration and determination that it be adjudged that Counter-Defendants, their agent, servants, employees, and attorneys have no right to use in their marketing the trade name "LA JOLLA KAYAK," and such variations thereof as "LA JOLLA KAYAKS," "LA JOLLA KAYAK RENTAL," LA JOLLA KAYAKING," LA JOLLA KAYAK TOURS," "KAYAKING LA JOLLA," and service mark in Registration No. 3,297,782.

Prayer for Relief

WHEREFORE, Counter-Claimants demand:

1. That Counter-Defendants, their officers, agents, servants, employees, and attorneys and all those persons in active concert or participation with them be forthwith preliminarily and thereafter permanently enjoined and restrained from:

a. Using the service mark in Registration No. 3,297,782, and trade name "LA JOLLA KAYAK" or any confusingly similar designation alone or in combination with other words, as a service mark, trade name component or otherwise, to market, advertise or identify Counter-Defendants' Bike & Kayak Tour business;

b. Otherwise infringing Counter-Claimants' mark;

c. Unfairly competing with Counter-Claimants in any manner whatsoever; and

d. Causing likelihood of confusion, injury to business reputation, of Counter-Claimants' symbols, labels, or forms of advertisement.

2. That Counter-Defendants be directed to file with this Court and serve on Counter-Claimants within ten days after the service of the injunction herein, a report in writing under oath, setting forth in detail the manner and form in which Counter-Defendants have complied therewith;

3. That Counter-Defendants be required to deliver up and destroy all devices, literature, advertising and other material bearing the infringing designation;

4. That Counter-Claimants be awarded Counter-Defendants' trademark infringement profits after an accounting, and that such an award be trebled, pursuant to 15 USC §1117(a);

5. That Counter-Claimants be awarded past and future corrective advertising costs;

6. That Counter-Claimants be awarded exemplary and punitive damages in the amount of $_________________;

7. That Counter-Claimants recover from Counter-Defendants their reasonable attorneys' fees and costs in this suit, and that such an award be trebled, pursuant to 15 USC §1117(a); and

8. That Counter-Claimants have such other and further relief as the Court may deem just.

JURY TRIAL DEMANDED

Counter-Claimants hereby demand a trial by jury of all issues so triable.

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Respectfully Submitted.

Dated: April 4, 2008

By: /S/ Brian J. Dunn______________
Brian J. Dunn, Esq.,
Attorney for Defendants and Counter-Claimants